LEGISLATIVE APPROPRIATIONS/Federal Contracts by Merit Only

SUBJECT: Legislative Branch Appropriations Bill for fiscal year 1996 . . . H.R. 1854. Gramm amendment No. 1825.

ACTION: AMENDMENT REJECTED, 36-61

SYNOPSIS: As reported, H.R. 1854, the Legislative Branch Appropriations Bill for fiscal year 1995, will appropriate $2.19 billion, which is $200.4 million (8.4 percent) less than was appropriated in fiscal year (FY) 1995, and which is 16 percent less than the President's request. The Office of Technology Assessment (OTA) will be abolished, the General Accounting Office will be cut by 25 percent over 2 years, and Senate committee funding will be reduced by 15 percent.

The Gramm amendment would prohibit the use of funds provided by this Act to award any Federal contract, or to require or encourage the award of any subcontract, based in whole or in part on the race, color, national origin, or gender of the contractor or subcontractor. This prohibition would not extend to outreach activities intended to encourage more minorities to bid on Federal contracts and subcontracts, nor would it apply to activities that were intended to benefit historically black colleges and universities. Further, it would not apply to court orders or consent decrees: that were issued before the date of enactment of this Act; or that were issued on or after the date of enactment and were to provide a remedy based on a finding of discrimination by a person to whom the order applied.

NOTE: After the Gramm amendment was offered, a Murray second-degree substitute amendment and an Exon (for Murray) second-degree perfecting amendment that had the effect of being a substitute were immediately offered. A unanimous consent agreement was then entered into for those two amendments to be withdrawn, to have a Murray first-degree amendment offered and debated concurrently with the Gramm amendment, and to have the votes on those amendments consecutively.

The Murray first-degree amendment added the following, "None of the funds made available by this Act may be used for any program for the selection of Federal Government contractors when such program results in the award of Federal contracts to unqualified persons, in reverse discrimination, or in quotas, or is inconsistent with the decision of the Supreme Court of the United States in *Adarand Constructors, Inc.* v. *Pena* on June 12, 1995" (see vote No. 318).

(See other side)

YEAS (36)

Republicans (33 or 63%)		Democrats (3 or 7%)
Abraham	Helms	Byrd
Bennett	Inhofe	Exon
Brown	Kempthorne	Hollings
Burns	Kyl	
Coats	Lott	
Coverdell	Lugar	
Craig	Mack	
D'Amato	McCain	
Dole	McConnell	
Frist	Murkowski	
Gorton	Nickles	
Gramm	Pressler	
Grams	Shelby	
Grassley	Smith	
Gregg	Thomas	
Hatch	Thurmond	
	Warner	

NAYS (61)

Republicans (19 or 37%)	Democrats (42 or 93%)	
Bond	Akaka	Kennedy
Campbell	Baucus	Kerrey
Chafee	Biden	Kerry
Cochran	Bingaman	Kohl
Cohen	Boxer	Lautenberg
DeWine	Bradley	Leahy
Domenici	Breaux	Levin
Hatfield	Bryan	Lieberman
Hutchison	Bumpers	Mikulski
Jeffords	Conrad	Moseley-Braun
Kassebaum	Daschle	Moynihan
Packwood	Dodd	Murray
Roth	Dorgan	Nunn
Santorum	Feingold	Pell
Simpson	Feinstein	Pryor
Snowe	Ford	Reid
Specter	Glenn	Robb
Stevens	Graham	Rockefeller
Thompson	Harkin	Sarbanes
	Heflin	Simon
	Johnston	Wellstone

NOT VOTING (3)

Republicans (2)	Democrats (1)
Ashcroft-[2]	Inouye-[2]
Faircloth-[2]	

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Those favoring the amendment contended:

The Gramm amendment would bar the use of funds from this Act to award a contract or subcontract to anyone because of their race, color, national origin, or gender. In contracting, everyone making a bid is capable of doing the job--the only question is how much are they going to charge. Under current practices, a minority-owned firm can make a $200,000 bid, and another firm can make a $100,000 bid, and the Government can hire the minority-owned firm because of the color of the skin of its owners. By definition, that is unfair. By definition, that is discrimination. It is un-American, and it should be stopped.

"To discriminate" means to make a conscious selection based on one or more factors. When hiring someone, it is illegal for an employer to discriminate (except in very narrow circumstances) based upon race, religion, ethnicity, color, or gender. For government employment, such discrimination is more than illegal--it is also unconstitutional. Discrimination is nevertheless common, though certainly not as endemic as it was when the Civil Rights Act was passed 30 years ago. When speaking of discrimination in the past, one usually meant discrimination by white male employers in favor of hiring white males and against blacks and Jews. Some discrimination was subtle, such as when Congress passed the Davis-Bacon Act to stop black employment in construction, and some was more blatant, such as the explicit quotas to limit Jewish admissions to major universities.

In recent years, though, a new type of discrimination has risen called "affirmative action." Affirmative action is intended to increase the number of women and minorities in school and on the job. Common names for affirmative action include quotas, reverse discrimination, set-asides, and preferences. Quotas are the selection of set percentages of women and minority applicants. After numerous court decisions, it is pretty well accepted that quotas are illegal for everyone to use, and are also unconstitutional for governments to use. For "reverse discrimination" and "set-asides" and "preferences," though, the differences are more of semantics. The term "reverse discrimination" refers to present discrimination against white men in order to offset past discrimination in their favor. "Reverse discrimination" is generally used as a pejorative term. "Set-asides" and "preferences," in our opinion, describe the other side of the same coin as "reverse discrimination." Instead of emphasizing that white men (and, increasingly, Asians) are treated less favorably, these terms only acknowledge that women and minorities are treated more favorably.

Some Senators contend that it is possible to have this type of favorable treatment without having less favorable treatment for white men. This contention is absurdly false. If any members of a group are discriminated in favor of for a limited number of openings, they will receive more openings than they would have if they had been forced to compete on merit, and the members of any other group will consequently have less openings for which to compete. Any discrimination for the members of one group is by definition discrimination against the members of all the other groups which were not favored.

The Supreme Court has looked on affirmative action with a jaundiced eye, as has the public. In case after case it has narrowed the legal right to use affirmative action. The recent *Adarand* decision reflects a further narrowing. In effect, that decision ended Congress' deference to Congress on its affirmative action policy for Federal contracting. The Supreme Court has only allowed State and local governments to use affirmative action programs if they serve a compelling interest and are narrowly tailored. Any other discrimination is unconstitutional. The Federal Government has used a lower standard, but the Supreme Court until *Adarand* did not overrule it out of deference to Congress as a co-equal branch of government. However, with the *Adarand* decision, the Federal Government's affirmative action programs will now have to meet the "compelling interest and narrowly tailored" test. Justice O'Connor cited *United States* v. *Paradise* as an example of a case in which hiring based on race would be permissible. In that case, every Justice agreed that the Alabama Department of Public Safety's "pervasive, systematic and obstinate discriminatory conduct" justified a race-based remedy.

Based on this ruling, we have little doubt that most of the Federal Government's discriminatory contracting policies will be found unconstitutional if challenged. Few companies that make bids are unqualified to complete them. The distinguishing feature that determines the best contractor in competitive bidding is the bid. Therefore, the best company is the company that submits the lowest bid. Under Federal contracting though, when there are minority bids the requirement that the best company must be picked need not be followed. The Government may instead apply a lower standard of picking a "qualified" minority contractor that submits a high bid. As we read the *Adarand* decision, this blatant discriminatory practice will in the future only be permitted by the courts as a remedy for "pervasive, systematic, and obstinate discriminatory conduct" by a Federal agency. Perhaps in some cases such conduct will be found, but in most cases Federal agencies have not been guilty of such conduct.

None of our colleagues want to admit that they are for discrimination. They say they favor favorable treatment for women and minorities, but will not admit that the other side of such treatment is unfavorable treatment for white men. The Murray amendment therefore, just like the President's speech the other night on affirmative action, sounds like it is against discrimination, but in reality it will not have the slightest effect on the current system. The amendment would bar quotas, it would bar reverse discrimination (which is a vague term that our colleagues deny is the same as preferences, set-asides, or affirmative action), it would express support for the *Adarand* decision (which of course is constitutionally required), and it would state that unqualified contractors may not be hired (which of course they may not be and are not currently).

The Gramm amendment, in contrast, is not just a lot of double-talk. It would not allow funds from this bill to be used to hire "qualified" minority contractors instead of hiring the most qualified contractors (unless a court has found persistent and blatant discrimination by an employer, which could then be remedied using reverse discrimination). The amendment would not stop

Government efforts to encourage minorities to apply, nor would it stop it from giving assistance in applying, nor would it stop it from engaging in any other activity to help minorities win bids. What it would stop is discrimination in hiring. As a matter of principle, we favor raising people up to a level where they can compete, but we disfavor cheating everyone else by giving preferences to people who cannot compete.

In arguing against this amendment, some Senators have used statistics to justify why they think there is racism and sexism in Federal contracting that justifies the use of preferences. Their numbers indicate that roughly 5 percent of all contracts are based on color, ethnicity, and gender instead of on merit. Their intention in citing this number was to show us that "only" 5 percent is given on what we believe to be an unjust discriminatory basis; however, we are appalled that the amount is that high.

Other numbers our colleagues have cited are distorted. For instance, some Senators have said how terrible it is that the Federal Government only gives 1.2 percent of its contracts to companies because they are women-owned. We inform them that women own more than half the wealth in America, including more than half of General Motors, General Electric, and other large multinational companies. Women also are at the helm of many large and small companies that win Federal contracts based on merit rather than the fact that they are run by women.

Even if one accepts that racism and sexism are so prevalent in Federal contracting that preferences are justified under the "narrow tailoring" test, it is important to note that the Supreme Court does not require the use of preferences. Other remedies may be employed. We do not believe it is right to commit an injustice to correct a past injustice, nor is it even advisable to commit an injustice to correct a current injustice. Two wrongs do not make a right. If Senators believe this simple principle, they will vote in favor of the Gramm amendment and against the Murray amendment.

Those opposing the Gramm amendment contended:

Argument 1:

When we hear our colleagues describe affirmative action, we sometimes wonder if we have all grown up in the same country, because we grew up in a country of equal opportunity. Affirmative action is not about giving special treatment; it is about giving a fair chance to women and minorities, who for too long have been excluded from getting good educations, good jobs, and enjoying the American dream. Our colleagues have talked about discrimination, but affirmative action today is not about quotas or reverse discrimination. Instead, it is about opening doors to qualified applicants.

Instead of simply opposing the amendment, we think it is necessary to counter some of the rhetoric of this debate by affirming, with a vote, exactly the type of affirmative action program we support with funds from this bill. The Murray amendment clearly states that no funds from this Act will be used for affirmative action programs that result in quotas or reverse discrimination. Further, the amendment would not allow any funds in an affirmative action program to be given to an unqualified contractor. Everyone who receives funding under this bill will be wholly capable of performing the job for which they are hired. Finally, the amendment would demand full conformance with the recent *Adarand* decision. That decision, it should be noted, did not ban affirmative action, as some observers seem to thing; the court explicitly reaffirmed that race-based remedies are permissible to correct pervasive discrimination.

Our colleagues have suggested that for 25 years we have legislated unfairness with Federal affirmative action policies. That 25 years stood out in our mind, because it made us think of the nearly 200 years in our country that women, blacks, and other minorities were treated as inferior. Especially considering our history of slavery, when blacks were treated as pack mules, were bought and sold, and were defined as being three-fifths human, we do not think that 25 years is a particularly long time. We do not deny that discrimination has lessened in recent years, but anyone who believes we have a colorblind society must themselves be blind.

The recent, sickeningly racist events at the "good ol' boys' roundup" of Federal law enforcement officers brought home for many of us that discrimination against blacks especially is still very much a part of the fabric of American society, even if it is usually much less visible. Statistics bear this observation out. In the presidential report "The Affirmative Action Review" a series of tests were conducted between 1990 and 1992. Those tests revealed that black applicants were treated significantly worse than equally qualified whites 24 percent of the time and Latinos were treated worse 22 percent of the time. According to a recent report by the Glass Ceiling Commission, 97 percent of the top executive positions in Fortune 1500 companies are held by white men. According to the Bureau of Labor and Statistics, black and Hispanic men in 1993 were only half as likely as white men to be employed as managers. Of the $160 billion total amount that is annually awarded in Federal contracts, only $8 billion is set aside for minority contracts, and of that $8 billion, only $1.9 billion is set aside for women-owned firms. Our colleagues complain that only $1.9 billion is being given to women, even though women comprise half the population. We think our colleagues are being pretty cheap. Discrimination obviously still exists, and we should work to remedy it.

The Gramm amendment, though, would not allow any of the funds from this bill to be used for affirmative action. The sponsor has also indicated that he intends to offer this same amendment over and over on each appropriations bill, until no Federal affirmative action contracting programs are left. This approach is a mistake. Clearly pervasive racism and sexism still exist in Federal contracting, and clearly the Federal Government has a right to act. We should not support reverse discrimination, nor should we support quotas, but we should support giving a helping hand to women and minorities to continue the fight against discrimination. We urge our

colleagues to join us in resoundingly defeating this amendment and any future amendments that may be offered with the same effect.

Argument 2:

This issue is too important and too complex to solve in a couple of hours debate. Discrimination is less prevalent than it once was, but it is still an unfortunate fact of life. Much of the progress that has been made in recent years has been due to Federal Government actions. We do not necessarily believe that this problem is one which will be solved by the free market, nor are we sure that the Federal Government will ever succeed. We should never abandon the fight though. In the wake of the *Adarand* decision, Congress should hold hearings to decide how it can legally continue to bring equity and fairness to all Americans. Though we have great respect for the sponsor of this amendment, we think he has made a mistake in asking us to end affirmative action without first giving the matter more serious consideration. Therefore, we must vote against the amendment.